CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

(DS394, DS395, DS398)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. Despite China's commitments to limit or eliminate the use of export restraints during the course of its negotiations to accede to the WTO, China's export restraints have proliferated in number and kind. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.

2. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. Each type of export restraint, including in some cases its administration, is inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Protocol of Accession to the WTO ("Accession Protocol"), which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO ("Working Party Report").

II. FACTUAL BACKGROUND

A. China's Policies for Developing and Promoting Its Domestic Industry Rely on Restraining the Exportation of Raw Materials

3. China's economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. This growth, however, comes at the expense of the rest of the world. China's production of industrial raw materials and processed goods has increased dramatically. China's exports of processed, value-added goods have also increased. However, China's exports of industrial raw materials have decreased.

4. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China's industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China's domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China's WTO obligations.

B. The Raw Materials

5. The nine industrial raw materials subject to the various export restraints imposed by China – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow

phosphorus, and zinc – are either naturally occurring minerals or materials that have undergone some initial processing. China is a leading global producer of all nine of these raw materials, which renders China's restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

C. Export Duties

6. China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

7. However, China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc,[1] even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

D. Non-Automatic Export Licensing Framework

8. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.[2] MOFCOM, together with Customs, formulates, adjusts, and publishes a catalog listing all goods whose exportation is designated for restriction. Exportation of such goods requires approval by MOFCOM and is subject to export licensing that is, accordingly, not automatic.

9. Non-automatic export licensing (all references to "export licensing" hereinafter mean non–automatic export licensing) is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas.

E. Export Quotas

10. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or

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[1] For purposes of the discussion of China's export duties, the terms "bauxite," "coke," "fluorspar," "magnesium," "manganese," "silicon metal," "yellow phosphorus," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

[2] For purposes of the discussion of China's non-automatic export licensing, the terms "bauxite," "coke," "fluorspar," "manganese," "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

prohibitions.[3] China maintains two systems for allocating export quotas: direct allocation or a quota bidding system. The export quotas on coke and zinc are allocated "directly." The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.

11. MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, determining whether to grant quotas, and in collaboration with Customs, is responsible for formulating, adjusting, and publishing a catalog listing all goods subject to export quota. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter export the relevant products.

12. While China publishes the annual quota amounts for most products subject to quota, China did not publish the annual quota amount for coke. China instead publishes notices during the year announcing that MOFCOM is distributing the export quota on coke to specific enterprises. China has not published any quota amount in relation to the export quota on zinc in 2009.

13. ***Coke Export Quota Application Process.*** China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Those criteria include having exported a certain amount of coke in previous years, and in the case of certain enterprises, having a certain minimum registered capital. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. China also requires enterprises applying to export coke under the quota to submit a number of documents including prior export invoices.

14. China empowers the CCCMC with responsibility for reviewing and evaluating the applications of enterprises seeking to export coke under the quota. Ultimately, MOFCOM publishes the list of all companies that satisfy the eligibility criteria on the basis of the CCCMC's advice.

15. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises. While the 2009 application procedures for foreign-invested enterprises do not appear to be published, the measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that such enterprises are subject to an application and approval process for the coke export quota.

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[3] For purposes of the discussion of China's export quotas, the terms "bauxite," "coke," "fluorspar," "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

16. While China also imposes export quotas on zinc, China has not published any measures in 2009 announcing the quantities of zinc that may be exported under the quota or any measures setting forth application procedures for enterprises seeking to export under the quota.

17. ***Export Quota Bidding.*** China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process. Enterprises seeking to export the materials subject to the bidding procedure are required to satisfy certain eligibility criteria in order to participate in the bidding process including criteria relating to minimum registered capital and prior export experience. The enterprises that satisfy such criteria and participate in the bidding process must submit a bid price and bid quantity for the material they are seeking to export. China then awards portions of the quota beginning with the bidding enterprise that submits the highest bid price. The enterprises that are awarded a portion of the quota must pay a "total award price" (*i.e.*, the enterprise's bid price multiplied by its bid quantity) in order to export.

18. MOFCOM has established Bidding Offices composed of *inter alia* representatives of the CCCMC to administer aspects of the bidding process. The Bidding Office's – and therefore the CCCMC's – responsibilities include reviewing the applications of bidding enterprises to determine whether they satisfy the requisite eligibility criteria. Applicant enterprises are also required to submit certain documents including a balance sheet and income statement, and information including registered capital, net profit, and prior export volumes and values.

F. Export Licensing Administration and Requirements

19. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in various ways.[4]

20. There are three types of export licenses, which determine where and how many times a particular license can be declared and used. Licenses must be obtained from particular license issuing entities depending on the product being exported and/or the type of exporter applicant. Export license issuing entities review applications based on a variety of factors and documents including documents of approval issued by MOFCOM in addition to the export contracts, exporter management qualifications, and other materials to be submitted, none of which are further identified or defined in the *Export Licensing Rules* or related licensing measures. Export licensing entities and individual staff members of such entities are subject to sanctions for violating the rules and regulations applicable to export license issuance.

G. Minimum Export Price Requirement

[4] As set forth above, for purposes of the discussion of China's non-automatic export licensing, the terms "bauxite," "coke," "fluorspar," "manganese," "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

21. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.[5] China implements this restraint through a non-transparent system. Based on statements made by China and documents submitted by Chinese exporters in U.S. courts, it appears that export prices that are set by the CCCMC are observed by exporters through an official "system of self-discipline" and further reinforced through the availability of penalties imposed by MOFCOM, and through China's licensing authorities and Customs.

III. Legal Discussion

A. China's Export Duties Are Inconsistent with China's Obligations under Part I Paragraph 11.3 of the Accession Protocol

22. Paragraph 11.3 of the Accession Protocol contains a commitment by China to "eliminate all taxes and charges applied to exports" except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

23. China imposes "temporary" export duties at *ad valorem* rates ranging from 10 to 40 percent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. These duties are charges applied to exports that are termed "export duties" in China's measures. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of Article VIII of the GATT 1994" because export duties do not fall within the scope of that Article. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Accordingly, China's maintenance of these temporary export duties is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

24. China also imposes a "regular" *ad valorem* export duty at a rate of 20 percent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate for yellow phosphorus to 50 percent, resulting in a total export duty rate of 70 percent effective January 1, 2009. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994. The maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 percent. Accordingly, the export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

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[5] *See* Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

B. China's Export Quotas Are Inconsistent with China's Obligations under Article XI:1 of the GATT 1994

25. Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining a restriction or prohibition made effective through a quota on the exportation of any product. However, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994. As China subjects the exportation of zinc to a quota, but does not publish any export quota for zinc, China effectively sets the export quota for zinc at zero. As a result, China prohibits the exportation of zinc, in contravention of Article XI:1 of the GATT 1994.

26. China's export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report, which contain enforceable commitments with respect to the elimination of export restrictions.

C. China's Administration and Allocation of Its Export Quotas Is Inconsistent with China's Obligations under the Accession Protocol, the Working Party Report, and the GATT 1994

27. ***Trading Rights***. China's commitments under paragraph 5.1 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining or maintaining the right to export including criteria relating to prior export experience and minimum registered capital. However, in its administration of the quotas for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to receive an allocation of the coke quota or participate in the quota bidding process.

28. ***Partial and Unreasonable Administration***. China's administration of its export quotas is also inconsistent with Article X:3(a) of the GATT 1994, which requires Members to administer certain measures described in Article X:1 in a "uniform, impartial and reasonable manner."

29. China empowers a private party – the CCCMC – to have direct involvement in the administration of the export quota on coke, which is allocated directly, and the export quotas on bauxite, fluorspar, and silicon carbide, which are allocated through the bidding system. The CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. In that role, the CCCMC also obtains access to sensitive and confidential information, including past export invoices in the case of the coke quota, and balance sheets and income statements in the case of the export quotas allocated

through bidding. The involvement of the CCCMC – an association of private commercial participants in a common industry – renders China's administration of these export quotas partial and unreasonable in contravention with Article X:3(a) of the GATT 1994.

30. ***Total Award Price***. Article VIII:1(a) of the GATT 1994 prohibits "fees and charges of whatever character . . . imposed . . . on or in connection with exportation" where such fees are not "limited in amount to the approximate cost of services rendered..." Enterprises that are awarded a portion of the export quota for materials subject to quota bidding are required to pay a total award price in order to export the materials. The total award price therefore constitutes a "fee or charge of whatever character . . . imposed . . . in connection with . . . exportation" within the meaning of Article VIII:1(a). The total award price is also not limited to the approximate cost of services rendered. Thus, the total award price is inconsistent with China's obligations under Article VIII:1(a) of the GATT 1994. The total award price is also inconsistent with paragraph 11.3 of the Accession Protocol as a "tax or charge" imposed on the exportation of products that are not listed in Annex 6.

D. China's Export Licensing for Products Subject to Restricted Exportation Is Inconsistent with China's Obligations under Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of the Working Party Report

31. China uses licensing to subject the exportation of designated products to restriction. China identifies such goods on a positive list of products subject to export licensing published annually. The list that China published for 2009 includes various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, indicating that the exportation of these products is designated by the state as restricted. Furthermore, the export licensing required to export the these restricted products is not automatic. In contrast, China also maintains an automatic export licensing system. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses. However, for goods whose exportation is designated for restriction, MOFCOM is not required to grant its approval to applicant exporters and is authorized to impose various conditions on their exportation.

32. Export licensing is thus a measure that restricts the exportation of these products in breach of China's obligations under Article XI:1 of the GATT 1994. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of non-automatic export licensing. China's export licensing is also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol.

E. China's Minimum Export Price Requirement Is Inconsistent with China's Obligations under the GATT 1994

33. China's minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above, prohibits the exportation of

these products if the export price does not meet a designated minimum. This constitutes a restriction on the exportation of these materials in contravention of China's obligations under Article XI:1 of the GATT 1994.

34. Furthermore, China administers the minimum export price requirement for yellow phosphorus through an enhanced enforcement mechanism known as the Price Verification and Chop ("PVC") procedure. The PVC procedure involves the participation of the CCCMC in the customs clearance process for yellow phosphorus. The CCCMC's participation permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with the exporters. This contravenes China's obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in an impartial and reasonable manner under Article X:3(a) of the GATT 1994.

35. Finally, China's failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China's obligations under Article X:1 of the GATT 1994.

IV. CONCLUSION

36. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.